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THE TERMINATION OF TREATIES AND EXECUTIVE AGREEMENTS BY THE UNITED STATES: THEORY AND PRACTICE

RANDALL H. NELSON*

The most universally accepted principle of international law relating to the subject of treaties is the doctrine of *pacta sunt servanda*.¹ The normal operations of international intercourse, however, make necessary from time to time the termination of treaties and other international agreements. Logically enough, a body of international law has developed with respect to the subject of termination, and certain general principles have been established. Some of these principles are controversial.² The discussion here will be confined to the constitutional law and practice of the United States relative to the termination of treaties and international agreements with emphasis on the period since 1940. The international law principles will be introduced where they are relevant to the discussion.

Green H. Hackworth enumerates the following procedures by which treaties may be terminated in accordance with international law: (1) notice by one of the parties pursuant to the terms of the treaty, (2) fulfillment of the provisions of the treaty, (3) expiration of the period of time for which the treaty was concerned, (4) extinguishment of one of the parties in the case of a bilateral treaty, or of the subject matter of the treaty, (5) agreement of the parties, (6) conclusion of a new treaty covering the same subject matter or one wholly inconsistent with the earlier treaty, (7) denunciation by one party with acquiescence by the other, and (8) effect of war.³ Although not included in this list, the doctrine of *rebus sic stantibus*, "a tacit condition, said to attach to all treaties, that they shall cease to be obligatory so soon as the state of facts and conditions upon

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1. The doctrine of *pacta sunt servanda* is a principle of general international law postulating the binding force of treaties. See Kunz, *The Meaning and the Range of the Norm Pacta Sunt Servanda*, 39 Am. J. Int'l L. 180 (1945); Lauterpacht, *Codification and Development of International Law*, 49 Am. J. Int'l L. 17 (1955).

2. See, e.g., the discussion of the effect of the outbreak of war upon international treaty obligations in MacDonald, *Jay Treaty of 1794—Abrogation of Treaties by Outbreak of War—Review of Canadian and Foreign Decisions*, 34 Can. B. Rev. 602 (1956); with respect to the doctrine of *rebus sic stantibus*, see Kunz, *supra* note 1, at 190; McDougal and Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: I*, 54 Yale L. J. 181, 339 (1945).

3. Hackworth, *Digest of International Law*, V, 297 (1953).

which they were founded has substantially changed,"⁴ ought to be included as a further basis for the termination of treaties.⁵

Since the international agreements which are designated "treaties" and "executive agreements" respectively by the constitutional law of the United States are included under the "generic" term "treaty" in international law,⁶ the conditions requisite to the valid termination of a treaty under the rules of international law are identical with respect to executive agreements. Therefore, the enumerated contingencies are equally applicable to both "treaties" and "executive agreements." A survey of United States practice during the period under study demonstrates conclusively that executive agreements and treaties have been terminated in precisely the same way. There is no evidence to indicate other than that the obligations assumed by the United States were of equal force and validity irrespective of the instrument employed to consummate the agreement.

A survey of the international agreements terminated by the United States since 1940 shows that all such terminations fall within the scope of one or the other of the legally accepted formulas enumerated above.⁷ There is no record of any arbitrary denunciation of

4. Black, *Law Dictionary* 1432 (4th ed. 1951).

5. Kunz, *supra* note 1, at 188.

6. Harvard Law School, *Law of Treaties, Draft Convention with comment, Supp.*, 29 Am. J. Int'l L. 439, 711 (1935); Brierly, *Report on the Law of Treaties*, U.N. Doc. No. A/CN. 4/23, 10 (1950); McNair, *The Law of Treaties*, British Practice and Opinions 48 (1938).

7. See the following for sample terminations:

(1) Official termination of International Materials Conference. At a meeting on December 15, 1953, the Central Group concluded that it had accomplished its task and recommended that the Conference be officially terminated as of December 31, 1953. 30 Dep't State Bull. 60 (1954).

(2) Termination of the Wheat Agreement with Pakistan. Agreement asserted by Prime Minister Mohammed Ali to "have" served its purpose. *Id.* at 760.

(3) Portugal-United States Military Agreement regarding facilities in the Azores, Sept. 6, 1951, art. XII, "This agreement will enter into effect on date of its signature and on the same date the agreement of Feb. 2, 1948, will cease to have validity." 27 Dep't State Bull. 14 (1952).

(4) On July 28, 1952, an exchange of notes between the United States and the United Kingdom released the government of the United States from the obligations of Jan. 18, 1952, under which agreement the United States had an obligation to prevent private importation of tin for the duration of the agreement unless consultation between the two governments took place. *Id.* at 266.

(5) Termination of Reciprocal Trade Agreement with Turkey of 1939 by mutual consent as of Aug. 4, 1952, because Turkey had become a member of GATT. Effected by an exchange of notes at Ankara, July 5, 1952. Termination to be effective on 30th day following date of note. *Id.* at 179, 268.

(6) Industrial Controls Agreement, United States, United Kingdom, France, replaces agreement signed April, 1949. 24 Dep't State Bull. 621 (1951).

(7) Greenland, Defense Agreement with Denmark signed April 27, 1951.

On entry into force, Agreement of April 9, 1941, shall cease to be in force, Art. XII. *Id.* at 814, 943.

(8) Trade Agreement with Costa Rica signed Nov. 28, 1936, and terminated by an exchange of notes dated April 3, 1951. Agreement to cease to be in force after June 1, 1951, by mutual consent. *Id.* at 622.

(9) As a result of Sweden's accession to GATT, an agreement was signed on May 25, 1950, by which the 1935 trade agreement was terminated, effective June 30, 1950. *Id.* at 624.

(10) Copyright Extension Agreement, United States-United Kingdom signed March 10, 1944. Cancelled by an exchange of notes of July 26, 1950. Termination was effective Dec. 29, 1950. 23 Dep't State Bull. 388 (1950).

(11) Reciprocal Trade Agreement with Mexico of 1942, terminated by an exchange of notes dated about June 23, 1950, and will cease to be in force on Dec. 30, 1950. Terminated only after long and mutually cooperative negotiations. *Id.* at 215, 501.

(12) Trade Agreement with Haiti Superseded as of Jan. 1, 1950, through operation of agreement under GATT. 22 Dep't State Bull. 30 (1950).

(13) Trade Agreement with Columbia of Sept. 13, 1935, by exchange of notes released on Oct. 17, 1949. Mutual consent. Will cease to be in force after Dec. 1, 1949. 21 Dep't State Bull. 711 (1949).

(14) Trade Agreement with Brazil, 1935. All provisions of the agreement were made inoperative except Art. XIV relating to termination upon six months' notice so long as the United States and Brazil are both members of GATT. Effected by an exchange of notes. Concluded June 30, 1948. 19 Dep't State Bull. 211 (1948).

(15) On Dec. 4, 1947, the President issued proclamation No. 2763, 12 Fed. Reg. 8866 (1947), declaring to be inoperative all provisions except those relating to termination on six months' notice of the trade agreement with respect to which it was issued—trade agreements with certain countries where such agreements conflicted with GATT, Belgo-Luxembourg Economic Union, France, Netherlands, and Great Britain. 18 Dep't State Bull. 30 (1948).

(16) Termination of Commercial Aviation Treaty with Cuba, 1928, in accordance with Article XXXVII of the treaty (T.S. 840) and in compliance with Article LXXX of the Convention of Civil Aviation (T.I.A.S. 1591). 17 Dep't State Bull. 599 (1947).

(17) Termination of Fox Fur Quota Agreement of 1940 as supplemented by an exchange of notes agreeing to supplementary trade agreement of Jan. 1, 1940, and later agreement replacing first of Dec. 20, 1940. Termination in accordance with terms by exchange of notes effective May 1, 1947. 16 Dep't State Bull. 678 (1947).

(18) Termination effective Oct. 29, 1946, of Agreement with Peru for El Pato Airbase of April 24, 1942, in accordance with termination clause. 15 Dep't State Bull. 866 (1946).

(19) Denunciation on July 25, 1946, by United States of Five Freedoms Agreement formulated at Chicago in 1944. Withdrawal is in accordance with Article V of the Agreement which requires ratification of all contracting parties. *Id.* at 236.

(20) Termination of 1941 Defense Agreement with Iceland effected by an exchange of notes, Sept. 19, 1946, which constituted a new agreement. *Id.* at 583.

(21) Termination of Coffee Price Control Agreement with Brazil was brought about by decontrol of coffee prices on Oct. 17, 1946. Memo of Understanding was to endure until March 31, 1947, or as long as coffee was subject to price control, whichever was the shorter period. *Id.* at 872.

(22) Rubber agreement between the United States, Argentina, and Brazil (T.I.A.S. 1542). Cancellation dated May 2, 1945. Effected by an exchange of notes. *Id.* at 514, 827.

(23) Expiration of Agreement signed on Nov. 28, 1944, between the United States and Portugal for airfield in Azores. Expired on June 2, 1946. Agreement provided for termination six months after end of hostilities or armistice with period of three months grace for removal of forces and ma-

an international agreement by the United States. The general practice has been to bring about the termination by an exchange of notes in which the agreement to terminate is set forth.⁸

In 1951, the Congress passed an act extending the Reciprocal Trade Act,⁹ section 5 of which instructed the President to abolish agreements containing trade concessions to all countries in the communist *bloc*. Most of the agreements concerned were executive agreements; but two, those with Poland¹⁰ and Hungary,¹¹ were treaties. The presidential response to the congressional direction¹² demonstrates rather conclusively that the United States treats executive agreements and treaties in precisely the same manner

terial by the United States. Effected by an exchange of notes bringing the agreement to an end. 14 Dep't State Bull. 1051, 1080 (1946).

(24) United States, Haiti, exchange of notes dated Sept. 9, and 16, 1944, confirming automatic termination of certain agreements between the United States and Haiti upon termination of the Haiti-Dominican Republic commercial treaty of Aug. 26, 1941. 11 Dep't State Bull. 394 (1944).

(25) United Maritime Authority Agreement of Aug. 5, 1944 (T.I.A.S. 1722), terminated March 2, 1946, by Agreement under paragraph 9. 14 Dep't State Bull. 487 (1946).

(26) Protocol on the Inter-American Registration of Trade Marks of Feb. 20, 1929 (T.S. 833), denounced by United States in accordance with Art. XIX, para. 3 of the Protocol on Sept. 29, 1944, by a letter to the Director General of the Pan American Union. 11 Dep't State Bull. 442 (1944).

(27) Relinquishment of Extraterritoriality with China by treaty of Jan. 11, 1943 (57 Stat. 767, T.S. 984). 7 Dep't State Bull. 805, 839, 854 (1942).

(28) The State Department announced that the United States considers itself released from requirements contained in para. (a), and (b) of the tax convention with Canada signed Dec. 30, 1936, by reason of the fact that Canada on April 30, 1941, raised the rates on non-resident Americans, entitling the United States, under the provisions of the Convention to regard these paragraphs as of that date. 4 Dep't State Bull. 546 (1941).

(29) Announcement of suspension of Parcel Post Agreements with certain foreign countries because of the disruption of transportation facilities. 2 Dep't State Bull. 720 (1940).

(30) Termination of Agreement for Reciprocal waiver of visa fees with Belgium. Termination effective March 9, 1940. Agreement signed April 15, 1927. *Id.* at 332.

8. In 1941, the President took the very unusual step of invoking the doctrine of *rebus sic stantibus* as justification for a proclamation (Proc. Fed. Reg. 3999) suspended the United States' obligations under the International Loadline Convention of July 5, 1930 (T.S. 858). The presidential proclamation was based on an opinion by the Attorney General, 40 Ops. Att'y Gen. 119 (1941). For comment, see Briggs, *The Attorney General Invokes Rebus Sic Stantibus*, 36 Am. J. Int'l L. 89 (1942).

9. 65 Stat. 72 (1951).

10. Poland, 44 Stat. 1507 (1948), T.S. 862.

11. Hungary, 44 Stat. 2441 (1948), T.S. 748.

12. The presidential proclamation read in part as follows: "Whereas an important element in determining when it may be practicable to apply these provisions to particular articles is the ability to do so consistently with the international obligations of the United States;

Whereas, in giving effect to the procedures available to free the United States from international obligations existing with respect to some of the nations and areas covered by the above provisions, it will not be practicable to apply such provisions to all such nations and areas at the same time." See Proc. No. 2935, 16 Fed. Reg. 7635 (1951).

when effecting their termination. Every agreement included within the scope of the congressional act was terminated in accordance with the letter of the agreement irrespective of whether it was labeled "treaty" or "executive agreement."¹³

Although the rules of international law for the termination of executive agreements are identical with the rules of international law for the termination of treaties, there are discernible distinctions in the municipal law of the United States with respect to this problem. Just as there is no provision in the Constitution with respect to the removal of officials appointed by the President "by and with the advice and consent of the Senate,"¹⁴ there is no provision in the Constitution for the termination of treaties which have been made "by and with the advice and consent of the Senate."¹⁵ The answer to the former question seems to have been settled by practice confirmed by the *Myers* case¹⁶ as modified by the *Humphrey* case.¹⁷

The *Myers* case presented the Supreme Court for the first time with the question "whether under the Constitution the President has the exclusive power of removing executive officers of the United States whom he has appointed by and with the advice and consent of the Senate."¹⁸ In 1917, President Wilson appointed Frank S. Myers "by and with the advice and consent of the Senate" to be a first class postmaster for a four-year term. The law under which the appointment was made expressly provided: "Postmasters of the first, second, and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate and shall hold their offices for four years unless sooner removed or suspended according to law."¹⁹ In 1920, prior to the expiration of the four-year term, President Wilson requested the resignation of Myers; and when Myers refused to tender his resignation, the Postmaster General, contrary to the provisions of the law, pursuant to the order of President Wilson, removed Myers from his office. Myers protested his removal and, upon expiration of the term for which he had been appointed, brought suit in the Court of Claims to recover the salary allegedly due him for the unexpired portion of his term. The Court of Claims decided against Myers. Myers died, but his wife and administratrix, Lois C. Myers,

13. See 25 Dep't State Bull. 95, 914 (1951); 26 Dep't State Bull. 946 (1952).

14. U.S. Const. art. II, sec. 2, cl. 2.

15. *Ibid.*

16. *Myers v. United States*, 272 U.S. 52 (1926).

17. *Humphrey v. United States*, 295 U.S. 602 (1935).

18. 272 U.S. 52, 106 (1926).

19. 19 Stat. 80, 81c (1876).

appealed to the Supreme Court. In a sweeping opinion, Chief Justice William H. Taft, who had previously rejected a broad interpretation of presidential power,²⁰ held the president's power to remove officers appointed by him "by and with the advice and consent of the Senate" to be complete.²¹

Addressing himself to the specific provision of the Constitution in question, the Chief Justice said, ". . . The executive power was given in general terms, strengthened by specific terms where emphasis was regarded as appropriate, and was limited by direct expressions where limitation was needed, and the fact that no expressed limit was placed on the power of removal by the Executive was convincing indication that none was intended."²² After delineating between the effect of a Senate veto on the appointing power and a Senate veto on the removal power,²³ Taft asserted that such limitation was "not to be implied."²⁴ In order to sustain his position, the Chief Justice continued:

The power of removal is incident to the power of appointment . . . and when the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power . . . the exclusive power of removal.²⁵

Doubtless drawing upon his own experience as President of the United States, Chief Justice Taft proceeded to affirm in the President the power to remove all officials appointed by him irrespective of their functions. With respect to the removal of the most important presidential subordinates, the Chief Justice said:

[I]n all such cases, the discretion to be exercised is that of the President in determining the national public interest and in directing the action to be taken by his . . . subordinates to protect it. In this field his cabinet officers must do his will. He must place in each member of his official family, and his chief executive subordinates, implicit faith. The moment he loses confidence in the intelligence, ability, judgment, or loyalty of any

20. In 1916, ex-president Taft had written, "The true view of the executive functions is, as I conceive it, that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary. . . ." See Taft, *Our Chief Magistrate and His Powers*, 139, cited in Corwin, *The President Office and Powers, 1787-1948; History and Analysis of Practice and Opinion*, 208 (3rd ed. 1948).

21. For a detailed statement of the facts of this case, see 272 U.S. 52, 106 (1926).

22. *Id.* at 118.

23. *Id.* at 121-122.

24. *Id.* at 121.

25. *Id.* at 122.

one of them, he must have the power to remove him without delay.²⁶

Continuing this line of reasoning, the Chief Justice promptly extended the scope of his assertion by holding, "The imperative reasons requiring an unrestricted power to remove the most important of his subordinates in their most important duties must, therefore, control the interpretation of the Constitution as to all appointed by him."²⁷ In a further elaboration of this statement, he specifically included within the scope of his opinion those executive officers who perform duties of a "quasi judicial character."²⁸ The Tenure of Office Act was declared by the Chief Justice to be unconstitutional, and the President was seemingly vested with an uncontrolled power of removal.

The opinion of the Chief Justice had clearly ranged beyond the question before the Court, that is, the removal of a first class postmaster, and in 1935, in the case of *Humphrey's Executor, Rathbun v. United States*,²⁹ the Court refused to acquiesce in the opinion of Chief Justice Taft and expressly repudiated that portion of the opinion which related to the removal of officials appointed by the President "by and with the advice and consent of the Senate" but whose duties were described as "quasi judicial or quasi legislative."

The facts of the case may be stated briefly.³⁰ William E. Humphrey was appointed in 1931 by President Hoover "by and with the advice and consent of the Senate" to be a member of the Federal Trade Commission for a term of seven years. In 1933, President Franklin D. Roosevelt asked for Mr. Humphrey's resignation. Humphrey refused to resign, whereupon President Roosevelt removed him from office. Humphrey refused to acquiesce in his summary removal and continued to assert his right to the office. Following Mr. Humphrey's death in 1934, a suit was pressed in the Court of Claims by his executor to recover the salary due him from the date of his removal until the date of his death.

The Act of February 13, 1925, under which the appointment had been made provided that "any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office."³¹

26. *Id.* at 134.

27. *Ibid.*

28. *Id.* at 135.

29. 295 U.S. 602 (1935).

30. For a complete statement of the facts, see 295 U.S. 602, 618-619 (1935).

31. 43 Stat. 936, 939 (1925).

After examining the legislative history of the act and the motives of Congress in prescribing the seven-year term for members of the Commission, the Court concluded that Congress had intended to limit the presidential power of removal by prescribing a specific term of office and limiting the power of removal to the causes enumerated.

In rendering a decision upon the constitutionality of the act as thus interpreted, the Court was obliged to distinguish the *Myers* case. Mr. Justice Sutherland, speaking for the Court, said :

The office of postmaster is so essentially unlike the office now involved that the decision in the *Myers* case cannot be accepted as controlling our decision here. A postmaster is an executive officer restricted in the performance of executive functions . . . the necessary reach of the decision goes far enough to include all purely executive officers. It goes no farther ; much less does it include an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President.

The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. . . .³²

The Court observed that to admit the power of the President to remove the members of the Federal Trade Commission would require a similar exercise of power with respect to the Interstate Commerce Commission and the Court of Claims.³³ The Court proceeded to hold that "under the Constitution that illimitable power of removal is not possessed by the President with respect of officers of the character of those just named."³⁴ The Court summarized its opinion as follows :

The result of what we now have said is this : Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term precluding a removal except for cause, will depend upon the character of the office ; the *Myers* decision, affirming the power of the President alone to make the removal, is confined to purely executive officers ; and as to officers of the kind here under consideration, we hold that no removal can be made during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute.³⁵

32. 295 U.S. 602, 627 (1935).

33. *Id.* at 629.

34. *Ibid.*

35. *Id.* at 631.

Therefore, insofar as the removal of purely executive officers is concerned, the broad scope of presidential removal power as expounded by Chief Justice Taft in the *Myers* case was left undisturbed. Inasmuch as the making of treaties pertains to the conduct of foreign relations, distinctly an executive power, much of Chief Justice Taft's argument in *Myers* can be applied with equal cogency to support an unlimited power of treaty termination by the President.

In the course of his opinion, the Chief Justice asserted:

Made responsible under the Constitution for the effective enforcement of the law, the President needs as an indispensable aid to meet it the disciplinary influence upon those who act under him of a reserve power of removal.³⁶

The conduct of foreign relations, like the duty to see that the laws are faithfully executed, is a plenary executive power. The power of the President to make treaties, like his power to make appointments, was expressly limited in the Constitution by the provision that he must first obtain the advice and consent of the Senate.³⁷ These are express limitations upon what otherwise appear to be executive powers. In the absence of express limitations upon the power to remove and the power to terminate, there is a strong presumption that no such limitation was intended.

Moreover, while the termination of a treaty is not a disciplinary measure, the termination or threat of termination of a treaty may on occasion be indispensable to the conduct of the foreign relations of the nation. As the sole organ of foreign relations,³⁸ the President has more sources of information at his disposal and is in a better position than any other official or agency of the government to make the final decision with respect to the continuance in force or the termination of any treaty.

As noted by the Court, the reason which prompted the placing of the restriction upon the President's power of appointment was to protect the small states against the large states by insuring that citizens of the smaller states would have a role in the operation of the administrative branch of the government.³⁹ State interests also prompted the adoption of the two-thirds rule with respect to treaty-making.⁴⁰ The termination of a treaty or the removal of an official

36. 272 U.S. 52, 132 (1926).

37. U.S. Const. art. II, sec. 2, cl. 2.

38. *United States v. Curtiss Wright Export Corp.*, 299 U.S. 304, 319 (1936).

39. 272 U.S. 52, 119 (1926).

40. *Hearings Before a Subcommittee of the House Committee on the Judiciary*, 78th Cong., 2d Sess., on H.J. Res. 6, 31, 64, 238, 246, 264, 320 (1944).

from office may be of vital interest to the President in insuring the enforcement of the laws or in the conduct of foreign relations; but insofar as protecting the rights of the several states is concerned, the powers of termination or removal are essentially negative in character.⁴¹ Therefore, the reasons for the limitations on the power to "appoint" officials and the power to "make" treaties do not apply with equal cogency to the removal of an official from office or to the termination of a treaty.

Nevertheless, the President has never been accorded an *exclusive* power to terminate treaties. Practice and opinion in the United States also supports the view that treaties should be terminated as they are made, *i.e.*, by the President and the Senate acting as the "treaty-making" power of the United States.⁴²

Although this theory has some merits, careful comparison to the appointing power and especially to the reasoning of the Supreme Court in the *Myers* case detracts from its cogency. If the President's power to terminate a treaty were made dependent upon the approval of two-thirds of the Senate, he could not discharge his constitutional responsibilities as the principal diplomatic officer of the nation without the constant threat of senatorial interference and consequent delay and embarrassment.

On the other hand, the provisions of a treaty become the supreme law of the land, and good theoretical arguments can be advanced for denying to the President alone the power to alter the law since, under the Constitution, the law making power is vested in the legislative branch of the government. Moreover, the Congress has the undisputed right to repeal the provisions of a treaty and thereby to destroy its effective internal enforcement. A case for congressional initiation of the termination can be made on the ground that the Congress should, in the anticipation of breaching the treaty by passing conflicting legislation, call upon the President to terminate the treaty in order to avoid an international delinquency.

These propositions are presented in order to demonstrate that any of the five possible methods for terminating a treaty involve constitutional difficulties. There is perhaps no better example of the dilemma resulting from the operation of the "checks and balances" of the Constitution. The five possible combinations which theoretically can be used to bring about the termination of a treaty are: (1)

41. 272 U.S. 52, 121 (1926).

42. See Riesenfeld, *The Power of the Congress and the President in International Relations; Three Recent Supreme Court Decisions*, 25 Calif. L. Rev. 660 (1947); Hackworth, *op. cit. supra* note 3, at 319; McDougal and Lans, *supra* note 2, at 337.

the President acting alone, (2) initiation by the President with the approval of the Senate, (3) initiation by the President with the approval of the Congress, (4) initiation by the Senate with the acquiescence of the President, and (5) initiation by the Congress with the acquiescence of the President. As a matter of fact, all five of these combinations have at one time or another in the history of the country been employed to bring about the termination of a treaty.⁴³ Furthermore, there has never been any court decision holding any one of the five to be *the* constitutional method for bringing about the termination of a treaty.⁴⁴ The varied practice and the complete silence of the Constitution with respect to the matter of termination would seemingly relegate this problem to the realm of "the political question," *i.e.*, a declaration by the Court that the question presented must be decided by the political branches of the government to the exclusion of the judicial branch. In the past, the Court has demonstrated a marked restraint in deciding cases involving the foreign relations power and has frequently avoided the issue by invoking the doctrine of the "political question."⁴⁵

The lack of a settled procedure may occasionally lead to political impasses in the future as it has in the past.⁴⁶ The nature of the constitutional grants of power, however, generally places either the President or Congress in the dominant position. In such cases the power of the body in the less advantageous position amounts to no more than that of verbal protest. Therefore, if the system is to work smoothly, the so-called "constitutional understandings" of Professor Quincy Wright⁴⁷ must be invoked in order to avoid the built-in

43. See Wright, *The Control of American Foreign Relations* 258 (1922); McClure, *International Executive Agreements, Democratic Procedure Under the Constitution of the United States* 16 (1941); Hackworth, *op. cit. supra* note 3, at 319-333; Riesenfeld, *supra* note 42, at 643; McDougal and Lans, *supra* note 2, at 334-337.

44. In 1936, the Supreme Court sanctioned the termination of a treaty by the President pursuant to the direction of the Congress, but the Court avoided a definitive discussion of the power of termination. See *Van Der Weyde v. Ocean Trans. Co.*, 297 U.S. 114 (1936).

45. See, *e.g.*, *Doe v. Braden*, 16 How. 635 (1853); *Terlinden v. Ames*, 184 U.S. 270 (1902); *Chicago and Southern Airlines v. Waterman Steamship Corp.*, 333 U.S. 103 (1948).

46. See McClure's account of President Wilson's refusal to acquiesce in the congressional directive contained in section 34 of the Merchant Marine Act of 1920 (41 Stat. 988, 1007). McClure, *op. cit. supra* note 43, at 23; see also Hackworth, *op. cit. supra* note 3, at 323.

47. Professor Wright explained his theory as follows: "The constitutional understandings are based on the distinction between the possession of a power and discretion in the exercise of that power. The law of the constitution decides what organs of the government possess the power to perform acts of international significance and to make valid international commitments, but the understandings of the constitution decide how the discretion of judgment implied from the possession of power ought to be exercised in

"invitation to struggle" suggested by Professor E. S. Corwin.⁴⁸

Many terminations, of course, leave no room for disagreement among the President, Senate, and Congress. In a case where: (1) the treaty expires in accordance with its terms, (2) the object of the treaty has been accomplished, or (3) the termination procedure is initiated by the other party to the treaty, the transaction seemingly falls within the routine diplomatic business of the President and the Department of State. The question of the extinguishment or continued existence of a state party to a treaty appears to be a matter for executive determination.⁴⁹ The determination as to whether a treaty should be terminated by reason of breach by the other party is also a matter of presidential discretion;⁵⁰ but this is a question which invites conflict between the executive and other interested political organs. The policy determination as to whether an effective treaty ought to be terminated is also a question which can lead to conflict between the political organs of the government.⁵¹

Where conflict does result between the President and Senate or between the President and the Congress over the termination of a treaty, it is interesting to note the relative power position of each organ.

If the President decides that a treaty has been terminated or decides to terminate a treaty, there is no way open to the Senate or the Congress to thwart him. He could conceivably be impeached; but the threat of impeachment, while ever a possibility, is not deemed to be an effective check upon the President except where acts of the utmost gravity are involved. Furthermore, once the President has delivered the notice of termination, there is no power which could recall that notice.⁵² Nor is it within the power of the other

given circumstances. The powers given by law to various organs often overlap. Even more often, two or more organs must exercise their powers in cooperation in order to achieve a desired end. In such circumstances, were it not for understandings, deadlocks would be chronic. The law is the mechanism, the understandings the oil that permit it to run smoothly." Wright, *op. cit. supra* note 43, at 8.

48. Professor Corwin has stated, "What the Constitution does, and all that it does, is to confer upon the President certain powers capable of affecting our foreign relations, and certain other powers of the same general nature upon the Senate, and still other such powers upon Congress; but which of these organs shall have the decisive and final voice in determining the course of the American nation is left for events to resolve.

All of which amounts to saying that the Constitution, considered only for its affirmative grants of powers which are capable of affecting the issue, is an invitation to struggle for the privilege of directing American foreign policy." Corwin, *op. cit. supra* note 20, at 208.

49. *Latvian States S.S. and Cargo Line v. McGrath*, 188 F.2d 1000 (D.C. Cir. 1951); *The Maret*, 145 F.2d 431 (3rd Cir. 1944).

50. *Charlton v. Kelly*, 229 U.S. 447, 476 (1913).

51. See discussion of Yalta Agreement, p. *infra*.

52. See Hackworth, *op. cit. supra* note 3, at 199.

contracting party to question the constitutional validity of his action.

If, on the contrary, the President voluntarily subjects his action to the approval of the Senate or the Congress, he thereby modifies his power to that degree in the interest of national unity. If the approval is granted, he strengthens his power position *vis-a-vis* the other contracting party. Moreover, it must always be remembered that the President's constitutional power to act is curtailed by political considerations. No President can long determine national policy without the support of Congress and party.⁵³

The President may act boldly when he is assured that he has the support of the Congress for his policy. He may act reasonably boldly when the Congress is divided and has no policy. He must act with extreme circumspection, however, when his policy is clearly at variance with a discernible congressional policy.⁵⁴ Therefore, he probably would not terminate a treaty on his own initiative in the face of overt hostility of the Congress nor would he ask the consent of the Senate or the Congress to such termination unless he were reasonably certain that he would not be embarrassed by a negative answer.

If the President has constitutional power which may on occasion give him the upper hand over the Senate and the Congress, the Congress likewise has power which can be exercised in such a way as to embarrass the President in the conduct of the foreign relations of the nation. From a standpoint of sheer power, the Congress can refuse to implement a treaty which has been concluded by the President and Senate. In the face of Congressional inaction, the President could only undertake the very embarrassing task of extricating the nation from its international obligation. He could not force the Congress to act. This is another instance, however, where power is more theoretical than real. The Congress is fully aware of the nature of the national obligations under international law. The degree to which the realities of this situation have

53. On this point, Professor Corwin asserts, "But whatever emphasis be given the President's role as 'sole organ of foreign relations' and the initiative thereby conferred upon him in this field, the fact remains that no presidentially devised diplomatic policy can long survive without the support of Congress, the body to which belongs the power to lay and collect taxes for the common defense, to regulate foreign commerce, to create armies and maintain navies, to pledge the credit of the United States, to declare war, to define offenses against the law of nations, and to make 'all laws which shall be necessary and proper' for carrying into execution not only its own powers, but all the powers 'of the Government of the United States and of any department or officer thereof.'" Corwin, *op. cit. supra* note 20, at 224-225.

54. Cf. Jackson, J., in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952).

been acquiesced in by the Congress is revealed by the fact that despite occasional protests, the Congress has never refused to make the appropriations necessary for the implementation of a treaty.⁵⁵

Similarly, the Congress may enact conflicting legislation and thus destroy the internal effect of a treaty.⁵⁶ The President may veto⁵⁷ such legislation or he may remonstrate with the Congress to reconsider its action⁵⁸ in order to protect the good faith of the United States. If the Congress remains adamant, his only course of action is to bring about the international termination of the treaty. The President could, of course, refuse to take steps to terminate the treaty, but in such case presidential recalcitrance would only prolong the international delinquency.⁵⁹ Therefore, where a difference of opinion between the President and Congress occurs, the presidential power to speak for the nation in the field of foreign relations is not without limit.

Of the three organs, the Senate would appear to be in the weakest position.⁶⁰ If the President requests its participation, it may refuse; but the Senate has no way of forcing the President's hand as does the Congress. The Senate, or for that matter, the House of Representatives, may, through a Senate or House resolution, call upon the President to bring about the termination of a treaty. Such action is not binding upon the President, and he may comply with or ignore the resolution as he sees fit. The President may likewise heed or ignore a concurrent resolution of the two Houses.

A slightly different problem is posed when the Congress instructs the President in the provisions of a duly enacted statute to

55. See Hackworth, *op. cit. supra* note 3, at 199.

56. See *Taylor v. Morton*, 23 Fed. Cas. 799 (1855); *The Cherokee Tobacco*, 11 Wall. 616 (1871); *Edye v. Robertson* (Head Money Cases), 112 U.S. 580, 598 (1884).

57. For an account of the veto by President Hays in 1879 of an act passed by the Congress which required the President to give notice to China of the abrogation of Articles V and VI of the Burlingame Treaty, see Hackworth, *op. cit. supra* note 3, at 324.

58. See the account of President Wilson's handling of the Panama Canal tolls dispute in Bailey, *A Diplomatic History of the American People* 599 (1940).

59. Conflict between the provisions of the Universal Service and Training Act of 1951 (65 Stat. 75 (1951), 50 U.S.C. § 451ff.), and Article VI of the Treaty of Friendship, Commerce, and Consular Rights with Germany (44 Stat. 2132, (1927), T.S. 725) made necessary the cancellation of the treaty provision. See exchange of notes signed June 2, 1953, T.I.A.S. 2972.

60. In a recent treaty, the Statue of the International Atomic Energy Agency, the Senate sought to strengthen its position in this respect by attaching an understanding to its resolution of ratification providing the United States would terminate its treaty relationship should an amendment to the statute be adopted of which the Senate did not approve. See 103 Cong. Rec. 8453 (text of statute), 8463 (text of understanding), 8534 (final adoption (daily ed. June 18, 1957)).

bring about the termination of designated international agreements. By the terms of the Constitution, the President is directed to "take care that the laws be faithfully executed";⁶¹ and in the normal course of events, he can be expected to abide by the letter and the spirit of the Constitution.⁶² Whatever the theoretical legal considerations, there is no constitutional or other governmental machinery short of impeachment whereby the President could be forced to obey the statute. Given the inherent possibility of conflict which is written into the constitutional system, there is no wonder that an occasional deadlock has occurred between the President and the Congress or the Senate with respect to the termination of this or that treaty. The wonder is that such deadlocks have been so few.

The discussion of the termination of executive agreements is somewhat simplified by the fact that the Senate has no separate role to play. The agencies concerned are the President and the Congress. As a matter of fact, the termination of executive agreements appears to have been vested by practice in the President, or the President and Congress acting jointly. There is no evidence of controversy on the point. The President, of course, as the organ of foreign relations, is the only organ of the government which can bring about the definitive termination of the international commitment.

The Congress, however, has adopted a neat formula for guaranteeing the retention of legislative control over agreements concluded under the color of an authorizing statute. In what now appears to be a uniform practice, the Congress inserts a provision in the statute which provides that the program may be cancelled by a concurrent resolution of the two Houses of the Congress.⁶³ Thus, while in theory the President has been granted sweeping powers under such acts as the Lend-Lease Act,⁶⁴ the Economic Cooperation Act,⁶⁵ and the Mutual Defense Act,⁶⁶ the Congress has in every instance retained the final control in its own hands. Some statutes have also set forth specific contingencies upon which the President may terminate any agreement.⁶⁷ These provisions could conceivably be inter-

61. U.S. Const. art. II, sec. 3.

62. See the statement of the Supreme Court in *Van Der Weyde v. Ocean Transport Co.*, 297 U.S. 114, 117-118 (1936).

63. See, e.g., E.C.A. Act of 1948, 62 Stat. 137, 155 sec. 122(a) (1948); Act to Provide for Assistance to Greece and Turkey, 61 Stat. 103, sec. 6 (1947); Mutual Defense Assistance Act of 1949, 63 Stat. 714, sec. 405(d) (1949); Lend-Lease Act of 1941, 55 Stat. 31, sec. 3(c) (1941).

64. 55 Stat. 31 (1941).

65. 62 Stat. 137 (1948).

66. 63 Stat. 714 (1949).

67. See, e.g., An Act to Provide for Assistance to Greece and Turkey, 61 Stat. 103, sec. 5 (1947); Mutual Defense Act of 1949, 63 Stat. 714, 718, sec. 405 (1949); Mutual Security Act of 1951, 65 Stat. 373, sec. 529; Foreign Aid Act of 1947, 61 Stat. 934, sec. 6 (1947).

puted to mean that the causes specified by the Congress were the only grounds upon which the President could cancel an agreement; however, such an interpretation appears to rob the procedure of its flexibility and to circumscribe too closely the President's power to conduct foreign affairs.

The most unusual provision relating to termination found in an authorizing statute appears in Section 118 of the Economic Cooperation Act of 1948.⁶⁸ The Congress vested the Administrator with power to terminate assistance to any country participating in the program should he determine that such country had committed any of certain acts specified in the law. Termination of the assistance would in fact mean termination of the agreement. Therefore, the Congress conferred upon the Administrator the power to terminate an agreement or agreements, the negotiation of which had been assigned to the Secretary of State after consultation with the Administrator.⁶⁹ This provision is especially conspicuous because in every other act the analogous provisions of the several authorizing acts place the power to terminate in the President. The provision is all the more interesting since there may well be some question as to whether the Administrator was intended to be an agent of the President or of the Congress. As in the other statutes, however, the Congress retained the right to terminate the program by passage of a concurrent resolution.⁷⁰ In addition, Congress may repeal the authorizing or approving legislation where such agreements have been authorized or approved by the Congress. Similarly, the Congress may pass a conflicting statute or refuse to provide funds necessary for the continued implementation of an agreement. Where the action by the Congress is positive, the President may use the veto to thwart legislation which he considers improper. In the case of a refusal to act in the matter of appropriation of funds for example, the President must yield, for he has no power with which to force the Congress to act. Many of the executive agreements to which the United States is a party recognize the power of Congress to render them ineffective by making specific provisions for termination in the event Congress should fail to make the necessary appropriations or should pass contrary legislation.⁷¹ The inclusion of such

68. 62 Stat. 137 (1948).

69. 62 Stat. 150, 151, sec. 115 (1948).

70. 62 Stat. 155, sec. 122(a) (1948).

71. See, *e.g.*, Article X of the Fur Seals Agreement with Canada effected by an exchange of notes between the United States and Canada dated December 8 and 19, 1942 (58 Stat. 1379, E.A.S. 415); Article I of the Mutual Defense Agreement with France signed Jan. 27, 1950 (T.I.A.S. 2012, 1 U.S.T. 34); Article I of the E.C.A. Agreement with Portugal signed

provisions is very desirable, most especially with respect to appropriations. The other contracting party must, of course, be granted reciprocal rights, but such an escape clause obviates the possibility of an international delinquency by the United States. Moreover, there is no evidence to indicate that the inclusion of such provisions has resulted in careless or arbitrary terminations by either party.

Although numerous bills and resolutions are introduced at every session of the Congress which indicate a disregard by individual Congressmen for the doctrine of the separation of powers, only on rare occasions does either House of the Congress act favorably upon a resolution which encroaches upon presidential prerogative in the field of foreign relations.⁷² The reluctance of the Congress to take the definitive step to bring about the abrogation of an agreement in the face of presidential opposition is nowhere better demonstrated than in the maneuvering which took place during the 83d Congress over the Yalta Agreement. Some members of the Congress were eager to repudiate the Agreement. The President, however, was unwilling to go further than to support an interpretive resolution.⁷³ Apparently, neither solution was attractive enough to a sufficient number of Congressmen to bring about its adoption. As a result the movement collapsed and the Yalta Agreement was left undisturbed.

By far the most significant recent action taken by the Congress to bring about the termination of a number of international agree-

Sept. 28, 1948) (62 Stat. (3) 2856, T.I.A.S. 1819) ; Article XVIII of Agreement for a Cooperative Program of Agriculture with Honduras signed Jan. 30, 1951 (T.I.A.S. 2209, 2 U.S.T. (1) 577) ; Agreement with Ecuador for the establishment of an agricultural experiment station in Ecuador effected by an exchange of notes signed Oct. 20 and 29, 1942 (56 Stat. 1787, E.A.S. 284).

72. House Joint Resolution 111 introduced by Rep. Thaddeus M. Machrowicz (D., Mich.) on Jan. 9, 1953, declaring that the Yalta Agreement is no longer binding upon the United States; H. J. Res. 162 introduced by Rep. Charles S. Kersten (R., Wis.) on Feb. 2, 1953, declaring the Yalta Agreement to be null and void and not binding upon the United States; H. C. Res. 13 introduced by Rep. Lawrence Smith (R., Wis.) on Jan. 3, 1953, declaring it to be the sense of the Congress of the United States that the private agreements concluded in 1945 at Yalta and Potsdam should be forthwith repudiated by the United States; H. C. Res. 22 introduced by Rep. Albert H. Bosch (R., N.Y.) on Jan. 16, 1953, declaring it to be the sense of the Congress that the text of the agreements private or otherwise concluded in 1945 at Yalta and Potsdam should be forthwith made public and re-examined to the end that a basis shall be found to accomplish the universal desire of all the people of the United States, to wit, a just and equitable peace; H. C. Res. 68 introduced by Rep. Alvin M. Bentley (R., Mich.) on Feb. 18, 1953, declaring it to be the sense of the Congress that certain provisions of the Yalta Agreement not be recognized by the United States.

73. See speech of President Eisenhower before the Congress on February 2, 1953. 99 Cong. Rec. 1344 (1953). See also the message of President Eisenhower to the President of the Senate, the Honorable Richard M. Nixon, dated Feb. 20, 1953, *id.* at 1344.

ments—both treaties and executive agreements—is to be found in the Trade Agreements Extension Act of 1951.⁷⁴ Since President Truman acted with alacrity⁷⁵ to comply with the congressional directive, no disagreement ensued.

Except for the more active role of the Senate in the termination of treaties, the termination of treaties and executive agreements is accomplished through virtually the same procedure.⁷⁶ As a matter of practice, the President has played a more active independent role in the termination of executive agreements. This is undoubtedly due in part to the fact that there are many more executive agreements than treaties and due in part also to the fact that many executive agreements are concluded by the President pursuant to his own constitutional powers. Certainly the procedures used for bringing about the termination of the treaty and the executive agreement cannot be used as a general rule for distinguishing the one from the other.

One of the interesting and unanswered questions in our constitutional law is one concerning the validity of a statute dealing with a subject outside the national jurisdiction after the treaty which it had been passed to implement has been terminated. The question has never arisen in the courts and has seldom been discussed by commentators. Nevertheless, there is a real possibility that the question will one day come before the courts. Since the justification for the legislation is to be found in the international obligation, it would seem to follow that when the international obligation is terminated, the *raison d'être* of the legislation would likewise terminate. At the precise moment of the termination of the treaty, the subject matter would cease to be within the scope of the treaty-making power and would revert to the states.

A similar, though not precisely analogous, problem is presented in the case of the repeal of a statute which is the basis for one or more executive agreements. Does the repeal of the statute automatically render the agreements inoperative as municipal law? Cer-

74. 65 Stat. c. 141, 72 (1951), provided as follows: "As soon as practical, the President will take action such as is necessary to suspend, withdraw, or prevent the application of any reduction in any rate of duty, or finding of any existing customs or excise treatment, or other concession contained in any trade agreement entered into under authority of Section 350 of the Tariff Act of 1930, as amended, and extended to imports from any nation or area dominated or controlled by the foreign government or foreign organization controlling the world Communist movement."

75. See Proclamation 2935 giving effect to sections 5 and 11 of the Trade Agreements Extension Act of 1951. 16 Fed. Reg. 7635 (1951).

76. Cf. McDougal and Lans, *Treaties and Congressional-Executive Agreements or Presidential Agreements, Interchangeable Instruments of National Policy*, 54 Yale L.J. 338 (1945).

tainly the unilateral act by the United States could not bring about the international termination of the agreements unless such exigency had been expressly provided for in the agreement. The agreements might also be of such nature that their continued operation would be impossible in the absence of the authorizing statute. Some agreements could continue to operate, however, unless the repeal of the statute automatically suspended their municipal force.

There are two early precedents bearing directly on this question. A diplomatic controversy with Brazil resulted when the repeal of the Tariff Act of 1890 was construed to terminate an executive agreement concluded under the authority of that Act. In answer to the Brazilian demand that the agreement continue in force for the period of time stipulated in the agreement, Secretary of State Gresham wrote:

The so-called treaties or agreements that were entered into based on the third section of the McKinley bill were not treaties binding upon the two Governments, and the present law is mandatory. Notice to your Government that the arrangement would terminate as provided by its terms would have no force, as the arrangement actually exists no longer.⁷⁷

An analogous situation occurred in 1909 when the Congress repealed the Tariff Act of 1897 under which several executive agreements had been concluded. The Congress had, with due regard for international good faith, provided that the agreements would terminate only after six months' notice to the other contracting parties. An agreement with France which had been concluded under the Act had been made without any provision for its termination, and France questioned the right of the United States to act unilaterally to terminate the agreement even subject to six months' notice.

Acting Secretary of State Wilson wrote to the French Charge d'Affaires Lefevre-Pontailis on August 23, 1909, in part as follows:

These commercial agreements, not being treaties in the constitutional sense, and hence not requiring the concurrence of the Senate of the United States, but having been negotiated under the authority of and in accordance with the legislative provisions contained in section 3 of the tariff act of July 24, 1897, would, in the absence of enabling legislation by Congress, have been terminated ipso facto on the going into effect of the tariff act of the United States approved August 5, 1909, which has changed the

77. Foreign Relations of the United States, I, 77 (1894). See letter of Secretary of State Gresham to Mr. Mendonca, Brazilian Minister, dated Oct. 26, 1894, reprinted in Moore, *A Digest of International Law*, V, 359 (1906); Wright, *op. cit. supra* note 43, at 235; McDougal and Lans, *supra* note 76, at 349.

bases on which these agreements were negotiated. In order, however, to avoid the abrupt termination of these international compacts, the Congress adopted the provisions contained in section 4 of the new tariff act. . . . Inasmuch as the agreements with France, Switzerland, and Bulgaria contain no stipulations in regard to their termination by diplomatic action, it was deemed proper by the Congress of the United States that these agreements should not be terminated abruptly, but should be continued in force until the expiration of six months from April 30, 1909, the date when the foreign Governments concerned were formally notified by the Government of the United States of the intended termination of the commercial agreements under the Dingley tariff. . . . As you are aware, the President of the United States, in giving the formal notices on August 7, 1909, has been obliged to follow implicitly the prescriptions of the new tariff act of the United States.⁷⁸

Where, as in this case, the President has been expressly directed by the Congress to bring about the termination of the authorized agreements, he appears to have no alternative but to act, for the Congress concededly has the power to recall the authority delegated to the President. If, on the other hand, the Congress should repeal an authorizing statute without reference to the existing agreement or agreements and the operation of their provisions were possible without the supporting legislation, there would appear no bar to the President's continuing the agreement or agreements in force until the expiration of the period for which they had been concluded. The President would, of course, be divested of power to renew the agreement, since such renewal would amount in effect to the conclusion of a new agreement.

In addressing himself to this very question when testifying before the Senate Committee on Commerce, Mr. Edward G. Miller, Assistant to the Under Secretary of State, stated his views as follows:

I believe that a specific trade agreement entered into under the Trade Agreements Act, at the time when the Trade Agreements Act is in full force and effect, continues to be a valid agreement in accordance with its terms regardless of the expiration of the underlying Trade Agreements Act; subject, however, to the right of the Congress, by specific action, to provide that particular agreement shall be deemed to be no longer in force as to the United States. . . .⁷⁹

The courts have never passed upon this question, but certainly,

78 Cited in Hackworth, *op. cit. supra* note 3, at 429-30.

79. *Hearings Before the Committee on Commerce of the Senate*, 79th Cong., 2d Sess., on S. 1814, at 134 (1946).

in the absence of expressed intent to the contrary by the Congress, it is not to be lightly assumed that the Congress intended to expose the nation to a charge of bad faith where an alternative interpretation consonant with the principles of international law were possible.

Any discussion of the termination of treaties during the period under study would be incomplete without some reference to the provisions of the various peace treaties arising out of World War II with respect to the prewar bilateral treaties between the United States and the countries concerned. In each treaty, there was included a provision which empowered the victorious powers to renew or permit to lapse, as they should desire, the bilateral treaties between the victor and the vanquished.⁸⁰ In due time, the United States notified Bulgaria, Italy, Hungary, Rumania, and Japan by diplomatic notes of the treaties which were to continue in force. The defeated nations acquiesced in the decision of the United States in accordance with the obligations assumed in the treaties of peace.⁸¹

The validity of this procedure was challenged early in 1955 in a federal district court.⁸² Tommaso Argento, who was being held by the U. S. Marshal for extradition to Italy, filed application for a writ of habeas corpus on the ground that "no valid treaty existed between the United States and Italy authorizing his extradition."⁸³ Argento claimed that the treaty of extradition between the United States and Italy of March 23, 1868, as amended⁸⁴ had been abrogated upon the outbreak of war between the United States and Italy. He asserted that the notification to Italy by the Department of State that the United States, in accordance with Article XLIV of the Treaty of Peace with Italy cited above was "null and void and of no effect because it emanated from the State Department of the U. S. Government"⁸⁵ and was therefore "the usurpation of a power belonging to the U. S. Senate alone."⁸⁶ Argento contended that the

80. Peace Treaty with Italy, Article 44 (61 Stat. (2) 1245 (1947), T.I.A.S. 1648); Treaty of Peace with Bulgaria, Article 8 (61 Stat. (2) 1915 (1947), T.I.A.S. 1650); Treaty of Peace with Hungary, Article 10 (61 Stat. (2) 2065 (1947), T.I.A.S. 1651); Treaty of Peace with Rumania, Article 10 (61 Stat. (2) 1757 (1947), T.I.A.S. 1649); Treaty of Peace with Japan, Article 7 (T.I.A.S. 2490).

81. For notification by the United States see: with respect to Hungary, 18 Dep't State Bull. 382 (1948); with respect to Bulgaria, *id.* at 383; with respect to Rumania, *id.* at 356; with respect to Japan, 28 Dep't State Bull. 721 (1953); with respect to Italy, *id.* at 248.

82. *Argento v. North*, 131 F. Supp. 538 (1955), *aff'd sub. nom.*, *Argento v. Horn*, 241 F.2d 258 (6th Cir. 1957). See discussion in Oliver, *Treaties, the Senate, and the Constitution*, 51 Am. J. Int'l L. 606, 610 (1957).

83. 131 F. Supp. 538 (1955).

84. 15 Stat. 629, 16 Stat. 767, and 24 Stat. 1001.

85. 131 F. Supp. 538, 539-40 (1955).

86. *Id.* at 540.

only way in which the treaty could be revived was through action by the Senate of the United States. Judge Connell recognized the "ingenious" character of the challenge but invoked the well-known doctrine of the "political question" in order to avoid passing upon the specific issue raised. He said:

... for this court to hold that such treaty does not exist at all for the reasons claimed by the relator, would be tantamount to judicially deciding that for the past eight years on the twelve highly important subjects set forth in such treaty, our government has constantly acted without authority of law, and that our U. S. Senate has meanwhile utterly failed in understanding, appreciating, or doing its plain duty. It would further be tantamount to judicially deciding that until future prospective treaties on such twelve highly important subjects can be again negotiated by the executive branch of our government and ratified by the U. S. Senate, or specifically revived by approval of the U. S. Senate, that all such international relationships now in force or process are null, void, and of no legal effect.⁸⁷

Judge Connell's opinion was based upon the assumption that the war had not abrogated the extradition treaty but had only suspended its operation. He continued:

There is little or nothing in the twelve phases of international relationships aforementioned between these two countries which could be said to be so incompatible with war as to justify a judicial determination that this treaty was abrogated: and it was most desirable that such relationships be immediately resumed and that the original status of the parties in these twelve respects be quickly re-established. Such resumption of such status did not require the specific approval of the U. S. Senate because the decision thus made to resume relationships was political in its nature and with propriety was so determined by the political department of our government. The U. S. Senate approved them all originally; war then made it physically impossible for their continuity but war had no intrinsic incompatibility towards the relationship itself. The only decision herein made was that such relationship be resumed, revived and kept in force since the physical reason for its discontinuance had ended.⁸⁸

The crux of the opinion is the assumption by the court that the extradition treaty was not abrogated by the state of war between the U. S. and Italy. In affirming, the circuit court covered approximately the same ground that had been covered by Judge Connell.⁸⁹ The court held that "the treaty of extradition between the United

87. *Ibid.*

88. *Id.* at 540-41.

89. *Argento v. Horn*, 241 F.2d 258 (6th Cir. 1957).

States and Italy was not terminated but merely suspended during the war and that it is now in effect."⁹⁰ The court also placed primary emphasis upon the action of the political departments:

Counsel have cited us to no decision, and we have found none, specifically relating to the effect of war upon a treaty of extradition. Such a treaty does not conveniently fit into either of the alternative classifications set out in the Karnuth opinion quoted above. If the question were to be decided in a vacuum, the conclusion could only be that it is extremely doubtful that war *ipso facto* abrogates a treaty of extradition. Fortunately, however, the question need not be so decided, but can and must be decided against the background of the actual conduct of the two nations involved, acting through the political branches of their governments.⁹¹

If the treaty had been terminated by the war, the contention of the relator, Argento, would have been valid. However, under the present law as determined by the Supreme Court in *Terlinden v. Ames*⁹² and *Charlton v. Kelly*,⁹³ an executive declaration respecting the status of a treaty cannot be successfully challenged in the courts. In the present cases, the district court declared the action of the State Department in delivering notification to the Italian Government in accordance with the provisions of the treaty of Peace "was not only entitled to great weight but so much so as to constrain us to consider it determinative of the question before us."⁹⁴ The circuit court opinion was more cautious in dealing with this facet of the question.⁹⁵ Although not expressly mentioned by Judge Connell, the position of the executive branch was seemingly made impregnable by the fact that the Senate had given its express approval to the procedure followed by the Department of State when it advised and consented to the ratification of the Treaty of Peace with Italy. On this point, the circuit court observed:

The consummation of the treaty of peace with Italy in 1947 containing Article 44 providing for 'notification' by the United States of each prewar bilateral treaty it desired to keep in force or revive, the ratification of that treaty by the United States Senate, the subsequent notification by our State Department with regard to the extradition treaty, and the conduct of the political departments of the two nations in the ensuing nine years, evidencing their unqualified understanding that the extradition treaty is in full force and effect, all make it obvious that the

90. *Id.* at 263.

91. *Id.* at 262.

92. 184 U.S. 270, 288 (1902).

93. 229 U.S. 447, 475 (1913).

94. 131 F. Supp. 538, 542 (1955).

95. See 241 F.2d 258, 263 (1957).

political departments of the two governments considered the extradition treaty not abrogated but merely suspended during hostilities.⁹⁶

The *Argento* case⁹⁷ added to the developing case law on the subject of the effect of war on treaties. The most important case relating to this subject and the most important court decision relating directly to the termination of treaties during the period emphasized in this study is *Clark v. Allen*.⁹⁸ The case dealt with the effect of war on a bilateral treaty, the Treaty of Friendship, Commerce and Consular Rights of 1923 between the United States and Germany.⁹⁹ The question of the effect of war on treaties is a most complex and controversial one, a question of international law on which there is very wide disagreement.¹⁰⁰ Although the opinion of the court did not bring order out of chaos in the international realm, it definitely placed the Supreme Court's stamp of approval on the American trend toward minimizing the effect of war on bilateral treaty obligations.¹⁰¹ The Supreme Court had spoken on this question on two previous occasions.¹⁰² A dictum by Justice Bushrod Washington in *Society v. New Haven* established a precedent for the present practice. In discussing the effect of the War of 1812 upon Article VI of the Treaty of Peace with England of 1783,¹⁰³ he asserted:

But we are not inclined to admit the doctrine urged at the bar, that treaties become extinguished *ipso facto*, by war between the two governments, unless they should be revived by an expressed or implied renewal on the return of peace. Whatever may be the latitude of doctrine laid down by elementary writers on the law of nations, dealing in general terms, in relation to this subject, we are satisfied, that the doctrine contended for is not universally true. There may be treaties of such a nature, as to their object and import, as that war will put an end to them; but where

96. *Id.* at 262.

97. See *supra* note 82.

98. 331 U.S. 503 (1947).

99. 44 Stat. 2132 (1927).

100. Harvard Law School, *supra* note 6, 1183-1203; Lenoir, *Effect of War on Bilateral Treaties*, 34 Geo. L.J. 129 (1945); McDonald, *supra* note 2; Castel, *International Law: Effect of War on Bilateral Treaties; Comparative Studies*, 51 Mich. L. Rev. 556 (1953); Karnuth v. United States, 279 U.S. 231, 236 (1929).

101. For recent comments by the Department of State with respect to the question of the effect of war on the termination of treaties, see U.S. Dep't of State, *Law of Treaties as Applied by the Government of the United States of America 201ff.* (unpublished, Mar. 31, 1950); cf. Hackworth, *op. cit. supra* note 3, at 377-90.

102. *Society v. New Haven*, 8 Wheat. 464, 494 (1823); Karnuth v. United States, 279 U.S. 231 (1929).

103. 8 Stat. 80, 83 (1783).

104. *Society v. New Haven*, 8 Wheat. 464, 494 (1823).

treaties contemplate a permanent arrangement of territorial, and other national rights, or which, in their terms, are meant to provide for the event of an intervening war, it would be against every principle of just interpretation, to hold them extinguished by the event of war. . . . We think, therefore, that treaties stipulating for permanent rights, and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts; and unless they are waived by the parties, or new and repugnant stipulations made, they revive in their operations at the return of peace.¹⁰⁴

In 1929, after the lapse of more than a century, the Court once more had an opportunity to pass upon the issue.¹⁰⁵ Although the Court, speaking through Justice Sutherland, was careful to reconcile its opinion with the previous pronouncement by Justice Washington,¹⁰⁶ it nevertheless held Article III of the Jay Treaty of 1794¹⁰⁷ to have been abrogated by the War of 1812. The finding of the Court was based on the conclusion that an open frontier was incompatible with a state of war. The relevant portion of Justice Sutherland's opinion is as follows: ". . . the passing and repassing of citizens or subjects of one sovereignty into the territory of another is inconsistent with the condition of hostility."¹⁰⁸

The specific issue before the Court in *Clark v. Allen* was the question as to whether the outbreak of World War II had abrogated the reciprocal inheritance provisions of the Treaty of Friendship, Commerce, and Consular Rights between the United States and Germany.¹⁰⁹

The facts of the case may be summarized briefly. Alvina Wagner, a resident of California, died in 1942, requeathing her estate to nationals and residents of Germany to the exclusion of California heirs-at-law. The right of the German heirs to inherit depended upon the status of the reciprocal inheritance provisions of the Treaty of Friendship, Commerce and Consular Rights with Germany.¹¹⁰ Subsequently, in 1943, the alien property custodian "vested in himself all right, title and interest of the German nationals in the estate of this decedent" and instituted proceedings in the district

105. *Karnuth v. United States*, 279 U.S. 231, 239 (1929).

106. *Ibid.*

107. 8 Stat. 116, 117, art. III (1794): "It is agreed that it shall at all times be free to his Majesty's subjects, and to the citizens of the United States, and also to the Indians dwelling on either side of the said boundary line, freely to pass and repass by land or inland navigation, into the respective territories, and countries of the two parties, on the continent of America. . . ."

108. 279 U.S. 231, 239 (1929).

109. 44 Stat. 2132, 2135, art. IV (1927).

110. *Ibid.*

court against the executor of the estate and the California heirs-at-law for "a determination that they had no interest in the estate and that he was entitled to the entire net estate, after payment of administration and other expenses." The district court ruled in favor of the Alien Property Custodian.¹¹¹ The circuit court reversed on the ground that the district court was without jurisdiction.¹¹² The Supreme Court granted certiorari, held that the district court had jurisdiction, and remanded the case to the court of appeals for consideration on the merits.¹¹³ On the merits, the circuit court held for respondent's holding that the treaty provisions had been abrogated.¹¹⁴ The case came to the Supreme Court for a second time.¹¹⁵ Although the Supreme Court was passing upon the effect of the outbreak of war upon a reciprocal inheritance provision in a bilateral treaty for the first time, the question had previously been passed upon on more than one occasion by a state supreme court, the leading case being *Techt v. Hughes*.¹¹⁶ In each instance, the court had held that the treaty provision had survived the outbreak of war. The *Techt* opinion was particularly esteemed because it had been written by Benjamin Cardozo, later to be numbered among the most respected justices of the Supreme Court. As a matter of fact, the Supreme Court, speaking through Justice Douglas, incorporated the heart of the *Techt* opinion and endowed it with the sanctity of the supreme law of the land. Justice Douglas asserted:

We start from the premise that the outbreak of war does not necessarily suspend or abrogate treaty provisions. . . . There may of course be such an incompatibility between a particular treaty provision and the maintenance of a state of war as to make clear that it should not be enforced. . . . Or the Chief Executive or the Congress may have formulated a national policy quite inconsistent with the enforcement of a treaty in whole or in part. This was the view stated in *Techt v. Hughes*, and we believe it to be the correct one: . . . "The question is not what states *may* do after war has supervened, and this without breach of their duty as members of the society of nations. The question is what are to presume that they have done. . . . President and Senate may denounce the treaty, and thus terminate its life. Congress may enact

111. *Crowley v. Allen*, 52 F. Supp. 850 (1943).

112. *Allen v. Markham*, 147 F.2d 136 (1945).

113. *Markham v. Allen*, 326 U.S. 490 (1946).

114. *Allen v. Markham*, 156 F.2d 653 (1946).

115. A complete statement of the facts appears at 331 U.S. 503, 505 (1947).

116. 229 N.Y. 222, 128 N.E. 185 (1920); see also *Goos v. Brocks*, 117 Neb. 750, 223 N.W. 13 (1929); *State v. Reardon*, 120 Kan. 614, 245 P. 158 (1926). For a similar subsequent opinion, see *In re Meyers Estate*, 107 Cal. App. 799, 238 P.2d 597 (1951); and discussion in Lesser, *Treaty Provisions Dealing with Bilateral Treaties*, 51 Mich. L. Rev. 573 (1953).

an inconsistent rule, which will control the action of the courts. The treaty of peace itself may set up new relations, and terminate earlier compacts either tacitly or expressly. . . . But until some one of these things is done, until some one of these events occurs, while war is still flagrant, and the will of the political departments of the government unrevealed, the courts, as I view their function, play a humbler and more cautious part. It is not for them to denounce treaties generally, *en bloc*. Their part it is, as one provision or another is involved in some actual controversy between them, to determine whether alone or by force of connection with an inseparable scheme, the provision is inconsistent with the policy or safety of the nation in the emergency of war, and hence presumably intended to be limited to times of peace. The mere fact that other portions of the treaty are suspended or even abrogated is not conclusive. The treaty does not fall in its entirety unless it has the character of an indivisible act.¹¹⁷

The language of the Court supports two conclusions which appear to sum up the municipal law of the United States with respect to the question of the effect of war on bilateral treaties. (1) The political departments of the government may determine in the first instance whether a treaty has been abrogated by the outbreak of war, and the courts will be bound by the political decision.¹¹⁸ (2) In the absence of an expressed declaration or the adoption of an ascertainable policy to the contrary by the political departments of the government, the Court will not consider the provisions of a bilateral treaty to have been abrogated by the outbreak of war except where the enforcement of the treaty provisions would be detrimental to the national interest or otherwise incompatible with a state of war.¹¹⁹

In summary, it may be said that the problem of terminating international agreements in the United States is four dimensional. First, all international agreements must be terminated in accordance with the norms of general international law, as well as in accordance with the internal or municipal law. Secondly, the municipal law of the United States recognizes two distinct types of international agreements, treaties and executive agreements. Practice demonstrates that it has been the policy of the United States to terminate all international agreements, treaties and executive agreements, in accordance with the rules of international law.

The problem of treaty termination is complicated by the diffusion of the foreign relations power of the United States among the Presi-

117. 331 U.S. 503, 508 (1947).

118. The cited portion of the *Techt* opinion stipulated denunciation by the President and Senate, but it is clear that denunciation could be accomplished by any one of the five methods set forth on p. . . ., *supra*.

119. Divergence between United States and foreign practice is treated by MacDonald, *supra* note 2; Castel, *supra* note 100.

dent, the Senate, and the Congress and the failure of the framers to make any express provision for the termination of treaties. Diplomatic practice coupled with judicial opinion demonstrates that the President as the chief organ of foreign relations, has the primary responsibility with respect to the termination of treaties. He may perform this function alone or in conjunction with the Congress or the Senate. The Congress, on the other hand, may suspend the internal operation of a treaty by the passage of conflicting legislation or by refusal to pass necessary implementing legislation. Congressional action alone, however, cannot relieve the nation of its international responsibility.

Except for the fact that the Senate has no separate role to play, executive agreements are terminable by the same methods as treaties. As in the case of treaties, Congress can suspend the internal enforcement of an executive agreement by the passage of conflicting legislation, by refusal to enact implementing legislation, or by the termination of statutory delegation of power to the President. The Congress cannot, however, terminate *ipso facto* the international obligation which the United States has assumed in such agreements.

The courts have recognized that the primary responsibility for terminating international agreements belongs to the political branches of the government. The courts must, however, when called upon to do so, resolve difficult questions relating to the termination of international agreements. The actual power of termination is a political power; and, in this respect, presidential authority, though not exclusive, is paramount.

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